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EXAMINER

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The time period for reply, if any, is set in the attached communication.

1 RECORD OF ORAL HEARING

2
3 UNITED STATES PATENT AND TRADEMARK OFFICE

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5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES

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10 *Ex parte* NOEL LEE

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13 Appeal 2010-002446
14 Application 09/735,697
15 Technology Center 2800

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18 Oral Hearing Held: Thursday, March 10, 2011

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21 Before ALLEN R. MacDONALD, CARLA M. KRIVAK and
22 THOMAS S. HAHN, *Administrative Patent Judges*.

23
24 ON BEHALF OF THE APPELLANT:

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1 *The above-entitled matter came on for hearing on Thursday,*
2 *March 10, 2011, commencing at 10:26 a.m., at the U.S. Patent and*
3 *Trademark Office, 600 Dulany Street, 9th Floor, Hearing Room A,*
4 *Alexandria, Virginia, before Lori B. Allen, notary public.*

5
6 JUDGE MacDONALD: I guess we're ready to begin. Anytime
7 you're ready, you can start. You have 20 minutes.

8 MR. LaRIVIERE: Thank you, sir. Thank you for hearing the
9 case, in fact. Please be assured that I'm not planning to review the more than
10 10 years of file history here, or even the 2 years prior to that, when the
11 provision was filed. Suffice to say, we wish the history had been a lot
12 shorter and perhaps a lot clearer, as well.

13 Instead, my focus this morning is on the main cited reference,
14 Dwight. That's design patent Des. 401,220.

15 As the board knows, all claims have been rejected under USC
16 103 as un-patentable over Dwight in view of Barna and then, later, two other
17 citations, Liner and Crane, were added as applied to some of the dependent
18 claims. I am most concerned about Dwight.

19 Specifically, it does not disclose a power strip housing having
20 colored areas, as stated by the examiner, because the different hatching that
21 he points out cannot indicate different colors. In order for the hatching, also
22 known as graphical symbols in Dwight, to represent the color, or any color,
23 the statement, "The drawing is lined for color" must be inserted in the
24 specification under MPEP section or paragraph 1505.04(1).

25 There is no such statement in the specification of Dwight, and
26 there is nothing in the file history of Dwight indicating that it should have
27 been there. It is completely silent as to color as a feature of the design.

28 JUDGE HAHN: Counsel, could you identify where this is in
29 any of the briefings to the Board?

30 MR. LaRIVIERE: I'm sorry. Say again, please?

31 JUDGE HAHN: Where is this point that you're making in the
32 briefings to the board.

1 MR. LaRIVIERE: I am not sure that it's been in the briefings
2 so far. As I said, some of this record could have been clearer, by my
3 standards, at least. There have been some seven different attorneys involved
4 in this case over time, three different examiners, three different indications
5 of allowance. It's been quite a history, and I apologize for some of the
6 shortfall that we may have created.

7 Two of the six so-called hatchings are the same, as it turns out.
8 I have something that dramatizes this with me. May I give this to the Board?
9 These are indications of where the hatchings appear to be the same, namely
10 the horizontal lines that I have highlighted in blue, because typically, when
11 you look at the standards for patent drawings, horizontal lines are indicated
12 in blue. I have a copy of those handouts -- I'm sorry -- of those
13 standards -- with me if that would be helpful to the Board this morning.
14 That's taken from the guidelines that are on the website.

15 JUDGE MacDONALD: Is the MPEP the sole basis for your
16 argument that the examiner was in error in concluding that these hatchings
17 represent color?

18 MR. LaRIVIERE: Well, that's my major citation.

19 JUDGE MacDONALD: Is this not a standard practice in the
20 art, for example, would be a second argument?

21 MR. LaRIVIERE: As far as I know, it is a standard. In fact, I
22 have some samples of other standards, other cases, in which that kind of a
23 standard was held.

24 JUDGE MacDONALD: I'm sorry. I'm not certain what point
25 you're making there.

26 MR. LaRIVIERE: Well, I have examples of other design
27 patents that have the statement --

28 JUDGE MacDONALD: My question being, the examiner,
29 being a utility examiner, assumed that these were colors based on some
30 basis. I'm asking, isn't different types of hatching a standard practice in
31 some technologies to represent color? So, was this a completely baseless

1 assumption by the examiner or understanding by the examiner, or was there
2 some basis for it, it's just not the MPEP?

3 MR. LaRIVIERE: I'm not sure I'm following how to answer
4 that question, sir. I'm sorry.

5 JUDGE MacDONALD: Is the sole basis for your saying that
6 the examiner erred in the understanding of this reference the MPEP, or is it
7 practices and technologies outside the -- you know, separate from the MPEP,
8 standard references in the field?

9 MR. LaRIVIERE: Not that I know of, sir.

10 JUDGE MacDONALD: Okay.

11 MR. LaRIVIERE: I'm sorry. I think -- I think I've answered
12 that correctly. My apologies.

13 JUDGE MacDONALD: That was my understanding of what
14 you just said.

15 MR. LaRIVIERE: Okay.

16 Horizontal lines, according to the standards of symbology, the
17 graphical standards, horizontal lines can indicate blue, but as you will see,
18 the horizontal lines are a different registration. That is, there is a different
19 distance between the horizontal lines on one of the receptacles than there is
20 in the others.

21 There is also more than enough choices in the graphical
22 symbology standardized by the Patent Office to cover all six of those
23 receptacles. There's at least eight or nine --

24 JUDGE MacDONALD: I think we can -- our understanding is
25 that this reference doesn't use the standards, and you've made that point. Is
26 there anything else? I wouldn't stick to that point as your sole -- sole basis
27 of the argument today, simply because it's not in the brief.

28 MR. LaRIVIERE: All right. I can move on if you wish.

29 I believe or we believe that Dwight is nothing more than a
30 design for a power strip configuration featuring non-functional contours and
31 surface treatment, including stippling and perhaps some grooves or other
32 markings around the receptacles; actually fails to disclose the plurality of

1 colored areas on the power strip and then fails to render the present
2 invention obvious.

3 In addition, of course, Barna, Liner, and Crane don't add
4 anything, as well.

5 There is more with respect to Dwight that I'd like to mention.
6 Earlier on in the -- oh, by the way, there's one other thing about Dwight.
7 Dwight was brought to the attention in the file history, but many years ago,
8 and it was never applied. It was only very recently applied, after sitting in
9 the file for some eight or nine years.

10 Our interpretation of Dwight is also supported by some of the
11 marketing actions of the assignee, Acco, through its subsidiary, Kensington.
12 There were two articles. I have those samples with me, if those would be
13 helpful to the board.

14 JUDGE MacDONALD: Is this in the brief?

15 MR. LaRIVIERE: Well, these were cited in the case. They
16 were not in the brief.

17 JUDGE MacDONALD: Okay. I would say no, that we can't --
18 we can't take those.

19 MR. LaRIVIERE: Can't consider those. I see. All right. Well,
20 then, very fine.

21 The bottom line to all of this is, in these articles, cited by the --
22 one of the examiners, they actually promote the functionality of the
23 coloration feature of their product, and I have a copy of their product, as
24 well.

25 JUDGE MacDONALD: So, this is the assignee of the patent?

26 MR. LaRIVIERE: That's correct. The assignee of the patent is
27 Acco. It is the parent company of Kensington.

28 JUDGE MacDONALD: But my question is -- the public record
29 that you're pointing to shows that these are colors? Is that what I'm hearing
30 you say?

1 MR. LaRIVIERE: Well, the public record of their product
2 indicates they're colored, and the article indicates it's a function of the
3 product that they are supposed to be colored.

4 JUDGE MacDONALD: Okay.

5 MR. LaRIVIERE: Yet, that patent is not cited as protecting the
6 product. In other words, they don't say the patent to Dwight protects this
7 product. So, our point being that color has always been functional, in their
8 view, and never a part of the Dwight patent.

9 I guess that's all I have, as a matter of fact, that would be what
10 I'd like to present this morning, other than to simply ask, please allow this
11 case. It's been pending a long time.

12 JUDGE KRIVAK: I do have a question. Doesn't Barna teach
13 the color coded -- is a color-coded system?

14 JUDGE MacDONALD: Yeah, the secondary reference has
15 colors.

16 MR. LaRIVIERE: It does, but it does not have -- it doesn't
17 distinguish among identical receptacles or plugs. I think it was cited
18 primarily to -- in connection with the possibility of having stickers that you
19 could apply to the product, but it's a credit card slider terminal of some kind.

20 JUDGE MacDONALD: Do you have any questions?

21 JUDGE HAHN: I have no further questions.

22 JUDGE MacDONALD: Judge Krivak.

23 JUDGE KRIVAK: I do not.

24 JUDGE MacDONALD: I have no questions. Unless you have
25 anything more, we're closed.

26 (Whereupon, at 10:37 a.m., the proceedings were concluded.)

27 * * * * *